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No. 89-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SYLVIA EVANS, BERTHA BALARK, and CURTIS COLLUM, Individually, and on Behalf of Those Similarly Situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit correctly applied the rational-relationship test and the doctrines of waiver and law of the case to the facts presented.

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STATEMENT OF THE CASE

Evans v. City of Chicago ("Evans I")

The class-action complaints filed by Sylvia Evans ("Evans class"), Bertha Balark ("Balark class"), and Curtis Collum ("Collum class") each alleged that the practice of the City of Chicago ("City") in not paying its tort judgments promptly violated both the equal protection and the due process

clauses of the fourteenth amendment, even though the City ultimately paid all tort judgments with statutory interest. On January 2, 1980, the district court certified the Evans class. On August 15, 1980, the district court certified the Balark and Collum classes.

The district court, on January 28, 1981, issued a judgment order declaring, *inter alia*, that the City's practice of paying tort judgments of $1,000 or less before paying larger tort judgments violated the equal protection clause.[1] On appeal, the Court of Appeals for the Seventh Circuit affirmed that portion of the judgment.[2] *Evans v. City of Chicago*, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) ("*Evans I*"); *see also* Item 3, Appendix to Petition for Certiorari at 22-23. Subsequently, on May 30, 1984, the parties entered into a consent decree that provided for prompt payment of tort judgments unpaid as of December 31, 1983 and also provided for timely payment of tort judgments payable on or after January 1, 1984. The decree remains in effect, although on November 24, 1989, two months be-

[1] The court also declared § 9-104(b) of the Local Government and Governmental Employees Tort Immunity Act, III. Rev. Stat. ch. 85, § 9-104(b) (1981) ("Tort Immunity Act"), a provision permitting a 10-year payout of tort judgments plus interest not paid within the fiscal year in which the judgment becomes final, facially unconstitutional as violating procedural due process. The court did not enter findings of fact or conclusions of law as to § 9-104(a) of the Tort Immunity Act which permits payment of tort judgments in the next ensuing fiscal year after the fiscal year in which the judgment became final. *Id.* § 9-104(a).

[2] However, the Seventh Circuit vacated the declaration that § 9-104(b) of the Tort Immunity Act violated procedural due process, concluding that the district court should not have reached the issue because the City had never invoked the provision as justification for its tort-payment practices. *Id.* at 1299. Finally, the *Evans I* court declined to adjudicate the facial constitutionality of § 9-104(a) because the district court had not reached the issue. *Id.* at 1291-92.

fore the present petition for certiorari was filed, the City moved to vacate the decree in light of *Evans II*. No ruling has been made on the City's motion.

Evans v. City of Chicago ("Evans II")

These cases then returned to the district court for a trial on damages for the over-and-under $1,000 equal protection violation. However, the trial was not limited to damages but became a relitigation of the original equal protection violation; a litigation of additional equal protection violations; and, finally, a litigation of the substantive and procedural due process validity of § 9-104(a) of the Tort Immunity Act.

The district court delivered its oral opinion on October 22, 1987. The court reaffirmed the original over-and-under $1,000 equal protection violation. The court also found additional equal protection violations.[3] However, the court expressly declined to decide the due process constitutionality of § 9-104(a) of the Tort Immunity Act on grounds that a court should not determine constitutional issues that are not necessary to resolve the litigation before it.

The City appealed. The Collum class filed a cross appeal limited to the district court's damage award to its class. No cross appeal was filed on either the due process or equal protection issues and none of the plaintiff classes argued due process as an alternate ground for affirming the judgment.

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[3] The additional equal protection violations were: 1) the City's chronic underbudgeting of the tort judgment fund; 2) the City's failure to pay all judgments in order of entry; 3) paying enterprise fund, contract, and employment-related judgments before paying tort judgments larger than $1,000.

In its decision, the Seventh Circuit, after applying the law-of-case doctrine, overruled *Evans I* insofar as it found an equal protection violation in the differential payment practice for tort judgments over and under $1,000. Appendix to Petition for Certiorari at 16-18. The court of appeals concluded that, in paying judgments under $1,000 before paying the larger tort judgments, the City was rationally pursuing the legitimate interest of paying promptly as many judgments as possible with the funds available. *Id.* at 17. The court expressly held that the City's differential payment of over and under $1,000 tort judgment was not discriminatory. *Id.* The Seventh Circuit also held that there was no equal protection violation with respect to any of the City's practices of paying non-tort judgments such as enterprise fund, contract, and employment-related judgments before paying tort judgments over $1,000. *Id.* at 18-20. The court of appeals did not reach the due process issue because "[t]he parties to this appeal . . . did not raise any issue of due process." *Id.* at 21 n.15.

REASON FOR DENYING THE WRIT

THE SEVENTH CIRCUIT APPLIED THE RATIONAL-RELATIONSHIP TEST AND THE DOCTRINES OF WAIVER AND LAW OF THE CASE TO THE FACTS PRESENTED CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

1. There Is No Conflict Between The Decision Below And The Decisions Of Other Circuits Or Of This Court Regarding The Equal Protection Implications Of The City Of Chicago's Judgment Payment Practices.

Petitioners acknowledge that there is no dispute here as to the appropriate level of scrutiny to be employed in

this case. Petition for Certiorari at 18-20. Accordingly, in an effort to generate an issue meriting this Court's review of what seems to be a fact-bound decision, petitioners argue that *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129 (5th Cir. 1986), conflicts with the decision below. Petition for Certiorari at 15-18. In *Minton*, the Fifth Circuit addressed the sufficiency of due process and equal protection allegations that a local school district refused[4] to pay tort judgments entered against it when obtained by persons residing outside the parish within which the school district was located. 803 F.2d at 130-31. The district court had dismissed the complaint for failure to state a cause of action. The Fifth Circuit affirmed the dismissal of the due process claim but reversed the dismissal of the equal protection claim, reasoning that the plaintiff should be given the opportunity to prove at trial his claim of irrational discrimination between residents and nonresidents of the school's parish. *Id.* at 133.

No conflict exists between the law in the Fifth and Seventh Circuits. Both circuits allow equal protection claims premised on alleged discrimination in paying judgment creditors to go to trial on the issue of whether the discrimination is rational. Moreover, the Seventh Circuit in *Evans II* was faced with a very different question than was the Fifth Circuit in *Minton*—did the petitioners carry their burden of proving that the discrimination was without rational justification. The discriminatory practices alleged in *Minton* involved nonpayment of tort judgments based on the residency of the judgment holder. Neither

[4] In *Minton*, there was a flat refusal by a governmental body to pay judgments entered against it and in favor of nonresident plaintiffs. In *Evans II*, the City did not refuse to pay judgments; instead, the City paid all judgments with interest.

nonpayment of tort judgments nor the judgment holders' residency are issues in this case. As the Seventh Circuit held, the City's judgment payment practices were not based on any irrational discrimination and, in fact, the City paid all of its judgments with interest.

The other cases cited by petitioner also do not assist them. *Quincy v. Jackson*, 113 U.S. 332 (1885), was in federal court by way of removal; *Canal & Claiborne Streets R.R. Co. v. Hart*, 114 U.S. 654 (1885), was in federal court under diversity jurisdiction. Both cases were brought and decided under state law. No federal constitutional question was at issue. Similarly, no federal constitutional question was presented in *United States ex rel. Kilpatrick v. Capdevielle*, 118 F. 809 (5th Cir. 1902), and *Clearwater County v. Pfeffer*, 236 F. 183 (8th Cir. 1916). *Kilpatrick* involved the question under Louisiana law of whether a municipality could be required to apply unused taxing authority to satisfy a judgment. *Clearwater County* involved the question under Minnesota law of whether a judgment against a county should be satisfied from funds under the control of the county treasurer or whether it could be satisfied by a levy on the county's bank accounts. None of these cases addresses the issue presented here.

In sum, review of this case is not warranted since there is no conflict to resolve among the courts of appeal. *See* this Court's Rule 17.1(a).

2. The Alleged Disparate Treatment In This Case Is Subject Only To Minimal Scrutiny And The Seventh Circuit Correctly Applied That Standard Of Review To The Facts Presented.

The parties agree that minimal scrutiny under the rational basis test is the appropriate standard of review in this case because the alleged disparate treatment is not

based on a suspect classification and does not implicate a fundamental right. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); *see generally City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Under the rational basis test, the court examines the purpose of the challenged governmental action and the means employed to achieve the purpose; the purpose must be legitimate and the means reasonably related to securing the purpose. *See Rodriguez*, 411 U.S. at 40.

Petitioners maintain that the Seventh Circuit improperly applied the purpose prong of this test. Specifically, they argue that City cannot advance a legitimate purpose, as a matter of law, because its practice of paying tort judgments conflicts with a state statute and a local ordinance, both of which address the payment of tort judgments. *See* Petition for Certiorari at 20-21.

This Court has long held, however, that failure to follow neutral state or local law does not violate the equal protection clause absent animus or malicious intent. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (selective enforcement of local ordinance violates the equal protection clause only if motivated by "oppressive" intent); *accord Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944); *MacKay Tele. & Cable Co. v. City of Little Rock*, 250 U.S. 94, 100 (1919). No animus or malicious intent was alleged, much less proved in this case. The evidence at trial showed only that holders of judgments of less than $1,000 were paid before holders of judgments of $1,000 or more solely because of insufficient appropriations to the tort judgment fund. The evidence also showed that the differential payment was a reasonable solution to the problem of insufficient funding, because it enabled the City to pay more tort judgment holders than it would have been able to pay by any

other method. On these facts, the Seventh Circuit correctly held that the City's tort judgment payment practice was not discriminatory and did not violate the equal protection clause. Appendix to Petition for Certiorari at 17. This is the correct result under *Yick Wo* and subsequent equal protection decisions of this Court. Violation of state or local law does not, in itself, constitute "illegitimate" conduct forbidden by equal protection, contrary to petitioners' contention. Any other conclusion would federalize the bulk of state law.

In any event, the City's articulated interests of paying a larger number of creditors quickly and maintaining a workable budget process, which the court of appeals held justified its judgment payment practices, are not inherently inconsistent with § 9-104 of the Tort Immunity Act, the only statute cited by petitioners.[5] That statute requires only that judgments be paid within the fiscal year following the year in which the judgment became final or, in the case of hardship, within 10 years. *See* Ill. Rev. Stat. ch. 85, § 9-104 (1981). Nothing in the City's practice of paying smaller judgments promptly is inherently inconsistent with this statute. While the City may have failed to follow the procedures set out in the statute (a question for another case brought in state court), there is nothing about these articulated interests that is illegitimate under this statute. Thus, the question whether an articulated purpose inconsistent with state law can nevertheless be treated as legitimate for equal protection purposes is not present on these facts. Since the City's twin policies of paying promptly a larger number of tort judg-

[5] Petitioners make passing reference to "state statutes and municipal ordinances," *see e.g.*, Petition for Certiorari at 20, 21, but the only statute they specifically address is § 9-104.

ment holders and "maintaining a workable budgetary scheme," Appendix to Petition for Certiorari at 20, were legitimate (nothing in state law forbids such policies), and its payment practices were rationally related to these policies, there could be no violation of the equal protection clause.

Finally, there is no substance to the claim of the Balark and Collum petitioners that the Seventh Circuit applied a one-tiered rather than a two-tiered test in this case. Appendix to Petition for Certiorari at 19-20. Contrary to the petitioners' assertions, *id.*, the Seventh Circuit did indeed analyze both whether the City's articulated purposes were legitimate and whether the payment practices were rationally related to those purposes. The court concluded that they were. Appendix to Petition for Certiorari at 17-18 (analyzing the legitimacy of the City's interests and the rationality of its policy); 20 (same).

In short, the petitioners do not challenge in any meaningful way the basic legal principles employed by the Seventh Circuit. They challenge only the application of those principles to the facts at issue in this case. Such a fact-bound issue does not warrant review by this Court.

3. The Seventh Circuit Properly Applied The Procedural Principles Of Waiver And Law Of The Case To The Facts Presented.

Just as the Seventh Circuit correctly applied the purpose prong of rational basis scrutiny to the facts presented, it also correctly applied the doctrines of waiver and law of the case. As to waiver, the Seventh Circuit held that petitioners waived their due process claim because they did not raise it in their brief. Appendix to Petition for Certiorari at 21 n.15. This is a correct application of the law, since petitioners could have raised and

argued due process as an alternate ground for affirming the judgment of the district court. They did not, and the Seventh Circuit properly treated the issue as waived. *See Oviawe v. Immigration & Naturalization Serv.*, 853 F.2d 1428, 1431 n.5 (7th Cir. 1988) (waiver rules apply to appellees as well as to appellants).[6] Of course, an issue waived in the appellate court is not properly before this court. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, this waiver issue poses no question of any real novelty and the application of the law of waiver to these particular facts hardly merits the scrutiny of this court.

Similarly, it is clearly established that the law of the case doctrine cannot be used as a shield to preserve a wrong decision. *See, e.g., Arizona v. California*, 460 U.S. 605, 618, n.8 (1983) ("Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice"); *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)

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[6] Petitioners attempted to raise the due process issue in their petitions for rehearing and suggestion for hearing *en banc*. However, this untimely attempt to revive the issue did not cure petitioners' waiver of this issue in their respective briefs on the merits. *See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 656 n.13 (7th Cir. 1985); *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970); *Higa v. Transocean Airlines*, 230 F.2d 780, 786 (9th Cir. 1955). Moreover, this Court does not review an issue raised for the first time in the court of appeals on a petition for rehearing. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984).

(court of appeals erred in applying the law of the case to avoid considering the effect of an intervening state supreme court decision that correctly stated applicable law). For the reasons presented above, the decision of the *Evans I* court on the equal protection issue was wrong. It was corrected by the *Evans II* court, as required under the law of the case doctrine and any reasonable and just jurisprudence. Not only did the Seventh Circuit correctly apply the law of the case doctrine on the facts of this case, but the manner of applying this doctrine is also the type of fact-bound issue that does not warrant this Court's review.

Neither the issues relating to the scope of appellate review nor the substantive equal protection issue raised in the petition for writ of certiorari warrants review by the Court. The petition should therefore be denied.

CONCLUSION

There is no conflict between the circuits on the equal protection issue raised by petitioners. The Seventh Circuit correctly held that the equal protection clause was not violated by the City of Chicago's differential payment of its tort judgments. Further, the Seventh Circuit properly applied the law of case and waiver doctrines.

No issue is presented warranting review by this Court and, accordingly, the petition should be denied.

Respectfully submitted,

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